Supreme Court, U.S.
FILED
NOV 13 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 981.

MILE ROAD CORP.,
Appellant,

v.

CITY OF BOSTON,
Appellee.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

EDWARD M. DANGEL,
LEO E. SHERRY,
MAURICE CARO,
Counsel for Appellant.

11 Pemberton Square,
Boston 8, Massachusetts.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

Statement	1
Argument	1
Conclusion	6

Table of Authorities Cited.

Cases.

Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613	6
Yick Wo v. Hopkins, 118 U.S. 356	5

Statutes.

Mass. Acts of 1943, chapter 355	4, 5
Mass. Acts of 1962, chapter 583	4
Mass. General Laws, chapter 111, sec. 150A	3, 4, 5

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 981.

MILE ROAD CORP.,
Appellant,

v.

CITY OF BOSTON,
Appellee.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

Statement.

The appellee's motion to dismiss is based on the assertions (1) that the appeal was not taken in conformity to the Rules of Court, or (2) that the appeal does not present a substantial federal question.

Argument.

(1) The appellee contends that this Court has no jurisdiction in the subject matter of this case inasmuch as the jurisdictional statement failed to mention that the opinion appealed from is also listed in an unofficial report; and said statement failed to state the date the notice of appeal was filed and the court in which it was filed; all as required by Rules of this Court.

That there was a failure to mention an unofficial reporting of this case does not seem to the appellant to constitute

such oversight as may tend to mislead the Court or fail to present the true and accurate decision of the court appealed from. The citation of the official report was in fact given and the report itself included in the statement as Appendix A.

Similarly it is plain that omission of a statement of the date the notice of appeal was filed and the court in which it was filed was an inadvertent omission of certain procedural aspects clearly set forth in the properly certified record of the case presented to this Court and which clearly indicates that the appeal was seasonably and properly taken and which latter points are not argued by the appellee.

It is respectfully submitted that, if a matter is itself a proper subject of appeal, and properly and seasonably brought before this Court, then this Court will ordinarily not refuse to consider it if, though through inadvertence, as here advanced, there have been omitted pro forma statements or assertions.

(2)(*a*) The appellee contends that the appeal does not present a substantial federal question of an arbitrary and oppressive exercise of police power and presents general statements of law.

In support of this contention the appellee disputes the implications in the jurisdictional statement and asserts that the facts are too meager to present a substantial federal question of arbitrary or oppressive action.

It is respectfully suggested that mere volume of assertions, or verbosity, in presentation of facts does not thereby create a substantial federal question.

The certified record in this Court shows that the City of Boston Health Department issued a permit to the appellant, under date of March 16, 1962, which contains terms and conditions, and permits the appellant to dump ashes and house refuse. It is a printed form and issued to all

applicants who qualify. It was issued pursuant to the General Laws of the Commonwealth of Massachusetts for use of land assigned as a dumping ground for garbage, rubbish or other refuse pursuant to the provisions of Massachusetts General Laws, chapter 111, section 150A. The court appealed from so noted in its opinion (Appendix A, Jurisdictional Statement, p. 12).

G.L. c. 111, § 150A, is a statute of general application and applies to all cities and towns and all who seek permission for dumping.[1]

---

[1] MASSACHUSETTS GENERAL LAWS, CHAPTER 111.

SECTION 150A. No place in any city or town shall be established or maintained by any person, including any political subdivision of the commonwealth, as a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator unless such place has been assigned by the board of health of such city or town as a dumping ground or as a site for a refuse disposal incinerator subject to the provisions of any ordinance or by-law adopted therein under chapter forty A or corresponding provisions of earlier law. The assignment of a place as a dumping ground or as a site for a refuse disposal incinerator shall be conditioned upon such limitations with respect to the extent, character and method of operation thereof as may be necessary to protect the public health, comfort and convenience. The department shall advise, upon request, any board of health previous to the assignment of a place as a dumping ground or as a site for a refuse disposal incinerator; and any person aggrieved by the action of a board of health in assigning a place as a dumping ground or as a site for a refuse disposal incinerator, including persons in control of any public land, the selectmen of any town, and in cities having a Plan D or Plan E charter the city manager, and in other cities the mayor, when authorized by vote of the city council, may, within sixty days, appeal to the department from the assignment of the board of health, and the department may, after due notice and public hearing, rescind or suspend such assignment or modify the same by the imposition or amendment of conditions.

Every person, including every political subdivision of the commonwealth, maintaining or operating a place assigned as a dumping ground or as a site for a refuse disposal incinerator, shall maintain and operate the same in such manner as will protect the public health, comfort and convenience and prevent a nuisance or a danger

The appellant was singled out by the Legislature to be treated differently from all others who come within the purview of that statute. When the Legislature enacted chapter 583, Acts of 1962,[2] it did not modify or in any way amend or affect the application of G.L. c. 111, § 150A; while it remained applicable to all others, it was made not applicable to the appellant alone. Chapter 583 of the Acts of 1962 was aimed only at the appellant to prevent it from coming under G.L. c. 111, § 150A, while all others similarly situated were permitted to comply with G.L. c. 111, § 150A, and allowed dumping operations.

The court below found that "The act must be construed as an absolute prohibition of dumping in the area where the plaintiff's land is situated" (App. A, Jur. Statement, pp. 14-15).

Similarly, pursuant to chapter 355 of the Acts of 1943, governing the issuance of permits to maintain fires in the open air in the City of Boston, the appellant had been

---

to the public health by reason of odor, dust, fires, smoke, the breeding or harboring of rodents, flies or vermin, or other cause. The assignment of any place as a dumping ground or as a site for a refuse disposal incinerator may be rescinded or suspended, or may be modified through the imposition or amendment of conditions, at any time after due notice and public hearing, by the board of health of the city or town where it is located, or by the department upon determination that the dumping ground or site for a refuse disposal incinerator results in a nuisance and a danger to the public health.

The superior court shall have jurisdiction in equity to enforce the provisions of this section upon petition of the department or any person aggrieved.

[Inserted by Acts of 1955, c. 310.]

[2] MASSACHUSETTS ACTS OF 1962, CHAPTER 583.

The city of Boston is hefeby authorized and directed to prohibit the dumping of trash or refuse on land located in the Dorchester district in the area commonly called the Calf pasture, Mile road and Columbia point, said land being east and west of Mount Vernon street and east of Morrissey boulevard.

issued a permit, on March 5, 1962, to make fires in the locus (*ibid.* p. 12), subject to all the terms and conditions prescribed for all to whom such permits are issued.

Neither the dumping permit nor the fire permit had been rescinded, suspended or modified in a material way (*ibid.* p. 12), nor was it at any time or anywhere suggested in the record that the appellant was not complying with the requirements of the permits when the Legislature enacted the statute complained of.

To single out the appellant for denial of statutory rights or benefits (G.L. c. 111, § 150A; Acts of 1943, c. 355) accorded all others is violative of the principle laid down by this Court in *Yick Wo* v. *Hopkins,* 118 U.S. 356, that the police power must not be exercised arbitrarily; it must be so exercised as not to deny to any person the equal protection of the laws.

It is not deemed necessary, in this brief, to again cite authorities set forth in the jurisdictional statement. It is apparent, on the face of the proceedings, that there was an abuse of police power sufficient to give this Court cognizance of this case.

The statute did not inure to the benefit of the municipality. The court below found "The enforcement of c. 583 will cause great hardship to the city as to its sanitation needs and demolition requirements in that there is no other area within the city which is available for dumping, 'a vital need at the present time . . .' " (*ibid.* p. 13). At the same time the said court "agreed that the plaintiff is put out of business as a dump operator" (*ibid.* p. 15).

(2)(*b*) The appellee urges dismissal on the ground that the appeal does not present a substantial question of restriction of land use to such an extent as to amount to a taking without compensation.

All that was said above is pertinent to any argument under this heading. The court below said: "While it is

agreed that the plaintiff is put out of business as a dump operator, the record does not show that the land cannot be filled and put to other use. There has not, therefore, been a complete deprivation of property so as to be the equivalent of a taking without compensation" (*ibid.* p. 15).

It is respectfully submitted that, aside from the effect of the complained of statute on the value of the land, the effect on the appellant's business must be considered. The court below specifically found that "The plaintiff has a large and substantial investment in the dump, and enforcement of St. 1962, c. 583, will put the plaintiff out of business without compensation" (*ibid.* pp. 12-13).

This Court has held in *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission,* 294 U.S. 613, at 622: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

That principle is applicable here. It should have been observed by the Legislature and enforced by the court. Because it was not observed and enforced, the appellant's only recourse is to this tribunal.

Conclusion.

It is therefore respectfully urged that the appellee's motion to dismiss be denied and the matter proceed to be heard on its merits.

Respectfully submitted,

EDWARD M. DANGEL,

LEO E. SHERRY,

MAURICE CARO,

Counsel for Appellant.